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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/037,964	12/21/2001	Keith Dirks	2206.66001	7478

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EXAMINER

DEMILLE, DANTON D

ART UNIT	PAPER NUMBER
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3764

DATE MAILED: 03/02/2004

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary

Application No.

10/037,964

Applicant(s)

DIRKS ET AL.

Examiner

Danton DeMille

Art Unit

3764

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 13 December 2003.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1,3-19,22 and 23 is/are pending in the application.
- 4a) Of the above claim(s) 22 and 23 is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1 and 3-19 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date _____
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: _____

DETAILED ACTION***Claim Rejections - 35 USC § 112***

Claim 3 is rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention. Claim 3 recites that the body-contacting portion has a heated applicator pad. Claim 1 has already recited this. It is not clear if this is the same or in addition to that recited in claim 1.

Claim Rejections - 35 USC § 102

Claims 1, 6, 11, 12, 13 are rejected under 35 U.S.C. 102(b) as being clearly anticipated by Grossi et al. '998. Grossi teaches a body contacting portion including a heated applicator pad 163. The body-contacting portion is configured for emitting heat generated by heater 160. Grossi teaches that the absorbent pad 163 is for holding the medicament to be applied to the body, therefore the housing is configured so that massaging liquid in the absorbent pad 163 is emitted from the body-contacting portion and so that heat is also applied. As broadly claimed Grossi would appear to anticipate the invention.

Claim Rejections - 35 USC § 103

Claims 3, 4, 14, 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grossi et al. '998 in view of McGrath '548. There appears to be no unobviousness to adding a reservoir of massaging liquid so that the absorbent pad doesn't constantly have to be replenished. McGrath teaches such a convention in reservoir 82 adjacent a peripheral edge of the body-contacting portion 42. It would have been obvious to one of ordinary skill in the art to modify Grossi to include a reservoir and outlet adjacent the peripheral edge of the body-contacting

portion as taught by McGrath so that the user doesn't have to constantly replenish the supply of massaging liquid. Regarding claim 14, McGrath teaches a reservoir 58 pivotally mounted by hook-shaped projection 64 dimensioned to extend through an opening 66 in main housing 12.

Claims 5, 7-9 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grossi et al. '998 in view of Kiefer et al. '001. Grossi appears silent with regard to exactly how one is to control the temperature and vibration of the device however, an conventional means used to vary the temperature and degree of vibration such as a rheostat would have been an obvious provision to one of ordinary skill. One would need to control the temperature of the heat and amount of vibration dependent on practical considerations of intended use. Kiefer teaches such a convention. It would have been obvious to one of ordinary skill in the art to modify Grossi to include means to control the amount of heat and vibration such as taught by Kiefer to control the operation of the device. Regarding claims 7-9, it is well known to be able to adjust the amount of vibration and any specific range of vibrations would have been obvious. The specific amount of vibration is dependent on the intended use and the desired type of massage. Any conventional amount would have been an obvious provision in Grossi.

Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Grossi et al. '998 in view of Cheng '159. Cheng teaches rubber bolts 5 for isolating the gripping portion from the body contacting portion. It would have been obvious to one of ordinary skill in the art to modify Grossi to use vibration isolating members as taught by Cheng to dampen the vibration of the vibrator from the gripping portion.

Claims 16 and 17 are rejected under 35 U.S.C. 103(a) as being unpatentable over Grossi et al. '998 in view of McGrath '548 and Bacher. It would have been obvious to one of

ordinary skill in the art to modify Grossi to include a reservoir and outlet adjacent the peripheral edge of the body-contacting portion as taught by McGrath so that the user doesn't have to constantly replenish the supply of massaging liquid. McGrath teaches that lotions and creams can be used. When using cream sometimes the cream needs a little assistance emitting from the dispenser. Bacher teaches a pump including a thumbwheel 12 to assist the cream out of the dispenser. It would have been obvious to one of ordinary skill in the art to further modify Grossi to include a pump comprising a thumbwheel as taught by Bacher to assist the cream to issue from the dispenser.

Claims 18 and 19 remain rejected under 35 U.S.C. 103(a) as being unpatentable over Sivan et al. in view of Kiefer et al. '001. Kiefer teaches a housing, a pump using motor 46 and removable reservoir 10 pivots to the refill position shown in figure 1 and pivotable cover 8. Sivan may not teach the body contacting portion being configured for emitting heat, Kiefer teaches such a convention. It would have been obvious to one of ordinary skill in the art to modify Sivan to emit heat on the body contacting portion as taught by Kiefer to provide the added benefit of heat therapy.

Response to Arguments

Applicant's arguments with respect to claims 1-19 have been considered but are moot in view of the new ground(s) of rejection.

Regarding Cheng, applicant argues that the rubber bolts do not isolate the gripping portion from the body-contacting portion but rather secures the vibrating plate to the casing. Since the casing is the gripping portion and the rubber bolts isolate the vibrating plate from the gripping portion of the casing the Cheng clearly teaches the provision of isolating the vibrating


portion from the gripping portion as claimed. It is not clear how much weight can be given applicant's arguments that the isolating means of the instant invention is a gasket seal between the gripping portion and the body-contacting portion that does not function to provide any clamping force to hold the gripping portion and the body-contacting portion together, since there are no claim limitations defining this over the rubber bolts of Cheng acting as a gasket to seal the vibrations from the gripping portion.


Applicant is arguing in the rejection of Sivan et al. in view of Kiefer et al. the examiner is "picking and choosing" features of the references and combining them when there is no suggestion in those references to do so. The examiner respectfully disagrees. Both of these references teach applying lotions to the skin and massaging the skin working the lotion into the skin for cosmetic purposes. Sivan teaches applying the lotion and massaging the lotion into the skin using a vibrator. Kiefer teaches applying lotion and massaging the lotion into the skin using a vibrator. Kiefer also teaches the added benefit of applying heat at the same time. It is well known to those in the art that heat helps the absorbing process as well as increasing blood circulation in the area massaged. There is no unobviousness to do the same for Sivan. Providing heat to aid the massaging process in Sivan is not an inventive step since it has already been done as exemplified by Kiefer. It is not clear how applicant can disregard the teachings of the prior art.

Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

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A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

ddd
26 February, 2004
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Art Unit 3764